SUPREME COURT, U. S.
Supreme Court,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2055

SECURITIES INVESTOR PROTECTION CORPORATION,
Petitioner,

v.

JAMES C. BARBOUR, AS RECEIVER FOR GUARANTY BOND AND SECURITIES CORPORATION AND GUARANTY BOND COMPANY, INC.,
Respondent,

and

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals, reported at 496 F.2d 145, appears at page 80 of the Single Appendix (hereinafter "SA"). The unreported opinion of the District Court appears at SA 72.

Jurisdiction

The judgment of the Court of Appeals was entered on April 23, 1974 (SA 90). The petition for a writ of certiorari was filed on July 20, 1974, and was granted on October

21, 1974, 95 S.Ct. 172. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

The Securities Investor Protection Act of 1970 ("Act") created the Securities Investor Protection Corporation ("SIPC"), a nonprofit membership corporation consisting of most broker-dealers ("Members"). Among other things the Act authorizes SIPC to institute a proceeding for the liquidation of a Member in an appropriate case (*e.g.*, insolvency) for the protection (*via* SIPC's funds) of its public securities customers. As limited by this Court's order granting certiorari (SA 92) the questions presented are:

> 1. Whether customers of a Member have an implied private right of action to compel SIPC to meet its alleged obligations to them under the Act, despite Section 7(b) thereof which grants that right only to the Securities and Exchange Commission ("Commission")?[1]
>
> 2. If such a right of action can be implied, whether a receiver of a Member has standing to maintain it?

1. SIPC's petition for certiorari limited the question to customers of a Member because of the facts in this case. However, the Commission's Memorandum supporting SIPC's petition stated this question more broadly, *i.e.* "Whether the statutory right of the Securities and Exchange Commission to institute an action to compel the Securities Investor Protection Corporation (SIPC) to discharge its obligations under the Securities Investor Protection Act (the Act) is the exclusive means by which SIPC can be compelled to act, or whether there also exists an implied private cause of action." SIPC respectfully suggests that this slightly broader question is necessarily involved in light of the required statutory analysis.

Statutes Involved

The section of the Act directly involved is section 7(b)[2] which provides:

> "ENFORCEMENT OF ACTIONS. — In the event of the refusal of SIPC to commit its funds or otherwise to act for the protection of customers of any member of SIPC, the Commission may apply to the district court of the United States in which the principal office of SIPC is located for an order requiring SIPC to discharge its obligations under this chapter and for such other relief as the Court may deem appropriate to carry out the purposes of this chapter."

Other principal sections necessarily involved are sections 5(a)(1) and 5(a)(2)[3] which provide respectively:

> "NOTICE TO SIPC.—If the Commission or any self-regulatory organization is aware of facts which lead it to believe that any broker or dealer subject to its regulation is in or is approaching financial difficulty, it shall immediately notify SIPC, and, if such notification is by a self-regulatory organization, the Commission."—section 5(a)(1)

> "ACTION BY SIPC.—If SIPC determines that any member has failed or is in danger of failing to meet its obligations to customers and that there exists one or more of the conditions specified in subsection (b)(1)(A) of this section, SIPC . . . may apply . . . for a decree adjudicating that customers of such member are in need of the protection provided by this chapter."—section 5(a)(2)

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2. 15 U.S.C. § 78ggg(b). Hereinafter, for convenience citations to the Act as set forth in the United States Code will not include "15 U.S.C."

3. §§ 78eee(a)(1) and (2).

Respondent Receiver has cited section 3(b)(1)[4] which includes, among SIPC's enumerated general corporate powers, the power—

> "(1) to sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State, or Federal;"

For the Court's convenience sections 5 and 6[5] of the Act, to which many references will be made, are entirely set forth in the Appendix hereto.

Summary of the Case

Prior Proceedings

Commission's Action. Guaranty Bond and Securities Corporation ("Guaranty Bond") was registered as a broker-dealer pursuant to section 15(b) of the Securities Exchange of 1934[6] ("Exchange Act") (SA 2).[7] In December, 1970 (prior to the Act's effective date) the Commission commenced an action against Guaranty Bond, its principals and its parent, Guaranty Bond Company, Inc. (SA 1). The Commission sought to enjoin certain fraudulent and other conduct violative of the Exchange Act and the Securities Act of 1933.[8] On January 6, 1971 the District Court granted a preliminary injunction (SA 41).

Scope of Receivership. On January 27th the District Court granted the Commission's motion for the appointment of a receiver after finding that Guaranty Bond and its par-

4. § 78ccc(b)(1).

5. §§ 78eee and fff.

6. 15 U.S.C. § 78*o*(b).

7. This Court's limited grant of certiorari would appear to have given finality to the Court of Appeals' decision that Guaranty Bond was also a Member of SIPC.

8. 15 U.S.C. § 77a *et seq.*

ent were insolvent (SA 60). The Court's memorandum decision directed, *inter alia:*

> "A receiver will be appointed and, absent any bankruptcy proceedings, he will conserve, administer and liquidate the affairs and assets of the defendant corporations."

On January 29th an order was entered (SA 54) appointing James C. Barbour as Receiver, conferring upon him usual powers to marshal and preserve the corporate assets, and authorizing him "to determine, adjust and protect the equities of creditors, customers and investors whose funds and other properties have been entrusted to or invested with said corporations." (SA 55, par. 3)[9]

SIPC's Decision Not To Intervene. SIPC first learned of the Guaranty Bond situation when it received a letter dated May 27, 1971 from the Receiver's counsel requesting "protection under the Act."[10] SIPC declined to intervene because of the scope, nature and practical completion of the liquidating receivership, and because both Guaranty Bond's hopeless insolvency and the Commission's action occurred before the Act's effective date (SA 39).

Receiver's Enforcement Proceeding

The Receiver's instant proceeding was commenced in April, 1972 by petition and an order of the District Court directing the Commission and SIPC to show cause ". . .

9. By the end of May, 1971, when SIPC first learned of the Guaranty Bond situation, the receivership had been expanded to include various other enterprises (not broker-dealers) affiliated with Guaranty Bond, the liquidation of Guaranty Bond and affiliates was substantially completed, and all securities (more than 15 million dollars worth) had been returned to their owners.

10. The Receiver admits his awareness of the Act "shortly after his appointment" four months earlier (SA 19).

why the remedies afforded by the Act should not be made available in this proceeding." (SA 28)

Receiver's Petition (SA 19). The Receiver alleged that he believed "the customers of Guaranty Bond and Securities Corporation are entitled to the protection of the Act." He acknowledged, however, that customers had received their bonds and credit balances and that their losses (if any) would result from a court-ordered deposit by customers equal to five percent of the principal amount of their bonds in order to defray part of the receivership expenses (SA 22, par. 13). Moreover, most of that deposit has since been refunded.[11]

Commission's Answer (SA 62). Among other things the Commission alleged in substance that SIPC's intervention would be needed only if customers actually sustained losses, and that such losses had not been demonstrated adequately especially since the Receiver might have causes of action against Guaranty Bond's principals which would benefit customers. The District Court had made extensive findings of fraudulent, dishonest and manipulative conduct by Guaranty Bond's principals, and cited their admissions of siphoning earnings from Guaranty Bond to its parent and wrongfully taking secret profits (SA 50, par. 19). It is undisputed that the Receiver has taken no action against those principals.

SIPC's Answer (SA 29). Among other things SIPC denied that Guaranty Bond's customers were in need of the Act's protection. It also alleged seven affirmative defenses including defenses (i) that the petition failed to state a claim upon which relief could be granted, (ii) that the court lacked jurisdiction, and (iii) that SIPC's refusal to intervene under the circumstances was either required by the Act or was a proper exercise of its corporate powers and discretion.

11. The Receiver's counsel has confirmed that the deposit now stands at only 1½ percent.

District Court's Opinion

The District Court sustained its subject matter jurisdiction and the Receiver's standing to maintain this proceeding stating, in part, that ". . . the default or neglect of the Commission to institute enforcement proceedings under § 7(b) should give rise to a similar cause of action by a receiver in behalf of a member's customers."[12] However, it dismissed the Receiver's petition on the ground that the Act was not intended to apply to broker-dealers, such as Guaranty Bond, who were hopelessly insolvent or in substantial net capital violation before the Act's effective date.

Court of Appeals' Opinion

The Court of Appeals also upheld the Receiver's standing. It held that customers of a Member have a right to bring an enforcement action against SIPC because of "the lack of express language of exclusivity in providing for an enforcement action by the S.E.C., coupled with a general provision allowing for suits against the S.I.P.C." It then sustained the Receiver's standing to maintain such an action on the ground that the Receiver, as the "representative" of Guaranty Bond's customers, meets the tests enunciated in *Sierra Club* v. *Morton*, 405 U.S. 727 (1971) and *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970). However, the Court of Appeals reversed the District Court and held that the Act applied to Guaranty Bond, despite its financial collapse in 1970, because it was allegedly ". . . in fact, a broker or dealer at the effective date of the Act."

12. There was no proof of default or neglect by the Commission.

Structure of the Act

Background

Prior to the Act stockbroker bankruptcies were conducted in accordance with section 60e of the Bankruptcy Act (11 U.S.C. §96e). Although securities customers were accorded preferential participation in a "single and separate fund", consisting generally of cash and securities held for their accounts, the bankrupt's depleted assets usually left them suffering losses. During the late 1960's the securities industry encountered a period of serious decline.[13] The New York, American and other Exchanges had voluntarily established trust funds to protect customers of failing member firms *via* self-liquidation procedures outside the Bankruptcy Act.[14] However that effort was unable to meet the mounting crisis.[15] Moreover, such trust funds were not available to customers of broker-dealers who were not members of those Exchanges.[16] To meet the situation and to bolster public investor confidence partly through a legislated fund, Congress broadly analogized to the Federal Deposit Insurance Corporation[17]

13. S.Rep. No. 91-1218, 91st Cong., 2d Sess. 3 (1970) ("Senate Report"); see also H.R. Rep. No. 91-1613, 91st Cong., 2d Sess. 2 (1970) ("House Report").

14. *Hearings on S. 2348, S. 3988, S. 3989 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency,* 91st Cong., 2d Sess. 149, 160, 191 (1970). *Hearings on H.R. 13308, H.R. 17585, H.R. 18081, H.R. 18109, H.R. 18458 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce,* 91st Cong., 2d Sess. 1 (1970). These hearings will hereinafter be cited as "Senate Hearings" and "House Hearings." See also House Report at 3; Senate Report at 3.

15. House Report at 3; Senate Hearings at 172.

16. House Report at 3; Senate Report at 3; House Hearings at 152.

17. House Report at 2; Senate Report at 4; Senate Hearings at 2, 8, 15.

and enacted a new program which was jointly sponsored by the securities industry and the Commission.[18] The several purposes of that program were stated thusly:

> ". . . to protect individual investors from financial hardship; to insulate the economy from the disruption which can follow the failure of major financial institutions; and to achieve a general upgrading of financial responsibility requirements of brokers and dealers to eliminate, to the maximum extent possible, the risks which lead to customer loss."[19]

The Act accomplished these purposes essentially by two methods. First, it enhanced the Commission's powers to establish financial responsibility rules for brokers and dealers[20] and to impose on the self-regulatory organizations[21] requirements for the financial examination of their members.[22] Second, it created SIPC which it empowered to commence proceedings for the liquidation of its Members whose financial condition posed the threat of loss to their customers ("Liquidation Proceeding"). In a Liquidation Proceeding customers are protected by SIPC's funds. Congress placed responsibility for its new program on the Commission, SIPC and the industry's self-regulatory organizations.

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18. House Report at 28; Senate Hearings at 12; House Hearings at 330.

19. Senate Report at 4; see also House Report at 1.

20. Section 7(d), § 78ggg(d).

21. Defined in Section 12(1), § 78*lll*(1), "self-regulatory organizations" currently consist of national securities exchanges and the National Association of Securities Dealers, Inc.

22. Section 9(f), § 78iii(f). Similarly SIPC is given responsibility to work with the self-regulatory organizations toward the standardization of their examining procedures and the development of procedures for the early detection of approaching financial difficulty of SIPC Members. Section 9(e), § 78iii(e).

SIPC Organization & Fund

SIPC is not an insurance company. It was conceived[23] and created as a private, non-profit, industry-funded membership corporation which would work within the self-regulatory structure of the securities industry.[24] Its Board consists of seven persons, five appointed by the President and confirmed by the Senate, and two designated respectively by the Federal Reserve Board and the Secretary of the Treasury.[25] Most broker-dealers are required to be SIPC members and to pay assessments to SIPC.[26] If SIPC's funds should be inadequate to carry out its purposes the Act authorizes a loan of up to one billion dollars from the United States Treasury.[27]

Commission Supervision

Although Congress plainly stated its intention that SIPC function as part of the self-regulatory structure, it was equally clear in stating its intention that, for SIPC, "self-regulation" stopped short of broad Commission supervision. As the House Report stated (at 12):

> "Your committee has, however, provided for substantial oversight on the part of the Commission over the conduct of the affairs of SIPC.
>
> • • • • •
>
> "Your committee, not only directs, but expects the Commission to use its oversight in a vigorous, but fair, manner." (See also footnote 30, *infra.*)

23. Senate Hearings at 231-233, 271-272; House Hearings at 199 *et seq.*, 365. See also House Report at 11-13.

24. Sections 3(a) and 4, §§ 78ccc(a) and 78ddd. A particularly good statement of SIPC's role in the self-regulatory structure is contained in the House Report at 11-12 ("Commission Oversight").

25. Section 3(c), § 78ccc(c).

26. Sections 3(a)(2) and 4(c), §§ 78ccc(a)(2) and 78ddd(c).

27. Section 4(f)-(h), § 78ddd(f)-(h).

Prompted in part by the availability of United States funds,[28] the Congress granted the Commission extensive supervisory powers over SIPC, including the Commission's right to bring an enforcement action against SIPC if it refuses to act for the protection of its Members' customers.[29] The Commission's powers also include (i) approval of SIPC's bylaws and rules, reinforced by the extraordinary power to "require the adoption, amendment, alteration of, supplement to or rescission of any bylaw or rule by SIPC, whenever adopted"; (ii) the approval of certain financial decisions involving SIPC's credit and funds, and (iii) effective control over matters relating to the borrowing and repayment of United States funds.[30] Additionally the Commission is empowered (i) to adopt rules adjusting certain provisions of the Act relating to the protection of customers, (ii) to determine the Act's applicability to the foreign operations of SIPC members, and (iii) on its own motion to participate as a party in any Liquidation Proceeding commenced by SIPC.[31] SIPC is required to make annual reports of its operations to the

28. Senate Hearings at 243; House Hearings at 219-220, 345.

29. Section 7(b), § 78ggg(b).

30. Sections 3(c)(2)-(3), 4(d)(2)(B), 4(e)(1) and 4(f)-(g); §§ 78ccc(e)(2)-(3), 78ddd(d)(2)(B), 78ddd(e)(1), and 78ddd(f)-(g). SEC Chairman Hamer H. Budge succinctly stated the Commission's oversight powers: "Actually the operation of the corporation, even the setting up under the original bylaws, is *under the nose, so to speak, of the SEC.* We can veto the initial bylaws if we want to, or any portion of them." Senate Hearings at 277 (emphasis added). See 116 CONG. REC. 39344 (1970) (remarks of Mr. Latta): "The bill gives to the Securities and Exchange Commission continuing oversight and rulemaking authority over the affairs of the Corporation to insure that the public interest is served." See also *id.* at 39347, 39348, 39352, 39366 (remarks of Messrs. Staggers, Springer, Eckhardt and Keith).

31. Sections 6(c)(2)(C)(iii), 6(d)(1) and (2), and 11(b); §§ 78fff(c)(2)(C)(iii), 78fff(d)(1) and (2), and 78kkk(b).

Commission which transmits them to the President and the Congress, with such comments as it deems appropriate.[32]

SIPC Reliance on Commission And Self-Regulatory Organizations

SIPC has no authority to examine its Members. It depends on the self-regulatory organizations and the Commission for information. The Act requires them to notify SIPC immediately when they believe that any broker-dealer subject to their regulation is in, or is approaching, financial difficulty.[33] Because violations of the federal securities laws are usually involved, in most cases SIPC commences a Liquidation Proceeding simultaneously with, or immediately after, an injunction action commenced by the Commission against the Member. The Act permits SIPC to combine its Liquidation Proceeding with any action brought by the Commission.[34]

Nature of Liquidation Proceeding

SIPC's authority to commence a Liquidation Proceeding for the protection of customers is an important aspect of the Act's program.[35] This responsibility also has aspects of enforcement. Thus, the Act authorizes liquidation of a SIPC Member which is not in compliance with applicable requirements under the Exchange Act, or rules of the Commission or a self-regulatory organization with respect to financial responsibility or hypothecation of customers' securities.[36] It is even permitted if a Member cannot make the

32. Section 7(c)(2), § 78ggg(c)(2).

33. Section 5(a)(1), § 78eee(a)(1).

34. Sections 5(a)(3)(A), 5(c); §§ 78eee(a)(3)(A), 78eee(c).

35. House Hearings at 219-220.

36. Sections 5(a)(2), 5(b)(1)(A); §§ 78eee(a)(2), 78eee(b)(1)(A).

computations necessary to establish such compliance.[37] If these or other specified conditions exist (*e.g.*, insolvency),[38] and if SIPC determines that a Member "has failed or is in danger of failing to meet its obligations to its customers," SIPC "may" commence a Liquidation Proceeding.[39] Whether and when it does depends upon its exercise of the discretion granted it.[40]

SIPC does not itself liquidate its members. It is merely authorized to commence a Liquidation Proceeding in the appropriate federal district court. The Member involved is entitled to contest SIPC's allegations.[41] Where the Member consents or SIPC prevails, the court is required to appoint persons designated by SIPC to serve as trustee and counsel[42] to carry out the purposes of the Liquidation Proceeding which is governed by the Act and certain provisions of the Bankruptcy Act.[43] Essentially a Liquidation Proceeding is a custom-made bankruptcy proceeding similar to the usual stockbroker bankruptcy conducted in accordance with section 60e of the Bankruptcy Act. A Liquidation Proceeding can be complex.[44] In the course thereof SIPC's funds provide limited protection to the Member's customers.

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37. *Id.*

38. *Id.*

39. Section 5(a)(2), § 78eee(a)(2).

40. Senate Report at 11; House Hearings at 200, 236-237, 331-333, 340-341; Senate Hearings at 259-260.

41. Section 5(b)(1)(B); § 78eee(b)(1)(B).

42. Section 5(b)(3); § 78eee(b)(3).

43. Section 6(c)(1); § 78fff(c)(1).

44. Duffy, *Reforming SIPC*, 7 REV. SEC. REG. 985, 990 (1974).

Customer Protection In Liquidation Proceeding

The Act was intended to provide for ". . . the prompt and orderly liquidation of SIPC members when required."[45] Section 6 contains detailed procedural and substantive provisions which determine the rights of customers and SIPC. With some variation it substantially tracks the provisions of section 60e of the Bankruptcy Act; the latter are therefore made inapplicable to a Liquidation Proceeding.[46] Some of the pertinent section 6 provisions are summarized below,[47] but there are many others (see Appendix hereto). As that summary shows, the Act does not attempt to make all customers whole. It establishes a plan of limited protection *via* the carefully delineated Liquidation Proceeding.

45. House Report at 9; see also Senate Hearings at 303.

46. Section 6(c)(1), §§ 78fff(c)(1).

47. The term "customer" is defined in great detail [Section 6(c)(2)(A)(ii); § 78fff(c)(2)(A)(ii)]. Such customers are entitled to the return of their specifically identifiable property, as defined [Sections 6(c)(2)(C), 6(c)(2)(A)(i); §§ 78fff(c)(2)(C), §§ 78fff(c)(2)(A)(i)]. All customers' property (except specifically identifiable property) constitutes a single and separate fund (the "Fund") for the benefit of customers [Section 6(c)(2)(B); § 78fff(c)(2)(B)]. Customers are entitled to share prorata in the Fund, based on the value of the "net equity" of their account (excluding specifically identifiable property) as of the "filing date" [Sections 6(c)(2)(A)(iv), 5(b)(4)(B); §§ 78fff(c)(2)(A)(iv), 78eee(b)(4)(B)]. If the Fund is insufficient to satisfy all customers' net equities the balance of their claims share in the general estate with general creditors [Section 6(c)(2)(B); §§ 78fff(c)(2)(B)]. Customers are protected by SIPC's funds only to the extent their net equities cannot be satisfied from the Fund and the general estate, and then only up to $50,000 per customer of which only $20,000 is available for cash claims [Section 6(f)(1); § 78fff(f)(1)]. In determining the unsatisfied amount of net equities, securities returned in partial satisfaction of securities claims are valued as of the "filing date" regardless of actual value at time of distribution [Section 6(c)(2)(B); § 78fff(c)(2)(B)]. Certain customers (specified insiders of the Member, and banks and broker-dealers not acting for customers) are entirely excluded from SIPC protection [Sections 6(f)(1)(C) and(D); §§ 78fff(f)(1)(C)and (D)].

It contemplates that customers' claims will be satisfied to the maximum extent possible from the assets already on hand with the Member. SIPC's funds merely supplement those assets within the limits and in the manner provided by the Act,[48] subject to SIPC's subrogation and recoupment rights (discussed below). The scope of customer protection and SIPC's exposure depends upon careful adherence to the statutory scheme.[49]

Completion of Certain Contracts

The Act was not intended for the protection of brokers and dealers.[50] However, after a Liquidation Proceeding is commenced to protect a Member's customers the Act authorizes the trustee in liquidation to complete certain open contractual commitments between the Member and another broker-dealer.[51] This authority was designed to avoid the so-called "domino effect", namely, the chance that the demise of a Member might precipitate the failure of one or more other broker-dealers.[52] Consistent with the Act's purpose to protect public customers, this provision applies

48. *Id.*

49. For example, there must be the correct identification of protected customers, the proper determination of their net equities, the valuation of their securities as of the "filing date" regardless of subsequent changes in value, the pro-rata distribution of securities when required, the enforcement of SIPC's rights of recoupment and subrogation, the avoidance of preferential transfers, and the vigorous pursuit of recoveries against a Member's principals and employees as well as third parties.

50. Senate Hearings at 257. See also *SEC* v. *Packer Wilbur & Co., Inc.*, 498 F. 2d 978, 984 (2d Cir. 1974).

51. Section 6(d), § 78fff(d).

52. House Report at 9; Senate Report at 4, 11; Senate Hearings at 147. See also *SEC* v. *Aberdeen Securities Co., Inc.*, 480 F. 2d 1121, 1125 (3d Cir.), *cert. denied*, 414 U.S. 1111 (1973).

only to commitments "in which a customer has an interest" unless the Commission in the public interest otherwise determines.

SIPC's Subrogation and Recoupment Rights

SIPC is not liable to the liquidated Member in any respect, its funds being available solely as advances to the trustee for the satisfaction of protected customers' claims and other specified purposes. Accordingly, (i) to the extent of its advances for customers it is subrogated to their claims and priorities against the Member's estate;[53] (ii) to the extent it advances funds for the completion of certain of the Member's open contractual commitments (discussed above) it enjoys a first priority right of recoupment;[54] and to the extent it advances administrative expenses it enjoys a priority right of recoupment under the express terms of the Act,[55] and through the operation of section 64a(1) of the Bankruptcy Act.[56]

53. Section 6(f)(1), § 78fff(f)(1); see also note 47 *supra*.
54. Section 6(c)(2)(B)(i), § 78fff(c)(2)(B)(i).
55. Section 6(c)(2)(B)(ii), § 78fff(c)(2)(B)(ii).
56. *Id.*

ARGUMENT

I

Section 7(b) of the Act confers upon the Commission, as part of its pervasive supervisory powers over SIPC, the exclusive right to obtain judicial review of SIPC's corporate discretion when SIPC determines that its intervention in a particular case would not be a proper application of the terms, policy or plan of the Act.

A. The Statutory Context in Which Section 7(b) Was Intended To Function Makes The Exclusivity Of The Remedy An Imperative Conclusion

The exclusivity of the enforcement remedy which section 7(b) added to the Commission's broad supervisory powers is evident from its terms and the extraordinary character of the remedy itself. However, this Court has often counselled that a statutory provision should be read in context and applied in harmony with other provisions and the legislative purpose,[57] not in a manner which would produce incongruous results[58] or make the statute work in a way which Congress did not intend.[59] It therefore seems appropriate to amplify the previous discussion ("Structure Of The Act") by bringing sharper focus upon certain

57. See, *e.g.*, *Boys Markets, Inc.* v. *Retail Clerk's Union*, 398 U. S. 235, 250 (1970); *Richards* v. *United States*, 369 U. S. 1, 11 (1962); *N.L.R.B.* v. *Lion Oil Co.*, 352 U. S. 282, 288 (1957); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 439 (1935).

58. See, *e.g.*, *N.L.R.B.* v. *Lion Oil Co.*, 352 U. S. at 288; *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U. S. 270, 285 (1956); *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955).

59. See, *e.g.*, *United States* v. *Sisson*, 399 U. S. 267, 298 (1970); *Perry* v. *Commerce Loan Co.*, 383 U. S. 392, 400 (1966).

aspects of the operation of the Act which seem especially germane to considerations deemed relevant by members of this Court in two cases upon which SIPC relies as controlling here, namely, *National R. R. Passenger Corp.* v. *National Association of R. R. Passengers*, 414 U.S. 453 (1974) and *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297 (1943).

Self-Regulatory Mechanism At Work Under The Act

Having established *via* SIPC an industry and government financial commitment for the protection of the investing public, Congress made careful provision "for upgrading the financial responsibility requirements of brokers and dealers"—one of its declared objectives.[60] The existing self-regulatory and Commission network of surveillance of brokers and dealers was drawn tighter not only to avoid the financial collapse of firms and resultant customer loss, but also to provide a system to assure prompt protective action by SIPC when appropriate. Toward these ends the Act also directed SIPC to consult and cooperate with the self-regulatory organizations in several areas, including the development and implementation of "procedures reasonably designed to detect approaching financial difficulty upon the part of any member of SIPC."[61]

Compliance with that directive was necessarily delayed. The Act became effective immediately on the date of

60. See page 9, *supra*. Congress also directed the Commission to compile a study of unsafe and unsound practices of Members of SIPC for Congress' review. Section 11(h), § 78kkk(h). The Commission made an extensive study and report. SEC, STUDY OF UNSAFE AND UNSOUND PRACTICES OF BROKERS AND DEALERS: REPORT AND RECOMMENDATIONS OF THE SECURITIES AND EXCHANGE COMMISSION. H. R. DOC. No. 92-231, 92d Cong., 1st Sess. (1971).

61. Section 9(e)(1); § 78iii(e)(1).

enactment, December 30, 1970. Time elapsed before SIPC was fleshed out with personnel and procedures.[62] However, SIPC has now held two annual conferences with representatives of most (all major) self-regulatory organizations and the Commission.[63] Partly as a result of those conferences and other SIPC initiatives, and significantly as a result of the independent initiatives of the self-regulatory organizations and the Commission, there now exist highly developed systems of broker-dealer surveillance to detect approaching financial difficulty.[64] As a result SIPC is kept aware of troubled firms on an "early warning" basis.

Liquidation Proceedings—SIPC's Discretion and Responsibility

A Liquidation Proceeding is the sole vehicle by which Congress authorized SIPC to expend its funds for the protection of customers.[65] Congress did not mandate SIPC automatically to commence a proceeding solely if the member is insolvent or falls within one of the other specified conditions.[66] Rather it required SIPC to determine that

62. This case arose on the eve of the Act's passage. The first Liquidation Proceeding under the Act was commenced on March 29, 1971. *SEC* v. *Howard Carlton, Inc.*, 71 Civ. 419 (S.D.N.Y.)

63. 3 SIPC ANN. REP. 29 (1973). The first was held in Washington, D. C., September 20 and 21, 1973. 1 SIPC CONFERENCE OF SELF-REGULATORY ORGANIZATIONS REP. 1 *et seq.* (1973) ["1 SIPC CONF. REP."]. The second was held in Washington, D. C., October 10 and 11, 1974.

64. 3 SIPC ANN. REP. 16-17, 29 (1973); 1 SIPC CONF. REP. 1 *et seq.*, 11-30 (1973); 39 SEC ANN. REP. 59 (1973); Wilson, *NASD SURVEILLANCE*, 7 REV. SEC. REG. 845 (1974).

65. The Act prohibits any plan of reorganization. Section 6(c)(1); §78fff(c)(1). See also, House Report at 10; Senate Report at 12; 116 CONG. REC. 40905 (1970) (remarks of Mr. Bennett).

66. See "Nature of Liquidation Proceeding" *supra* at 12-13.

the Member also "has failed or is in danger of failing to meet its obligations to customers." Even in that event, Congress provided only that SIPC "may" commence a Liquidation Proceeding. The discretion manifestly reposed in SIPC was essential to the achievement of customer protection in a manner consistent with broader public interests.

The Liquidation Proceeding is a drastic public remedy which is available to SIPC even in some circumstances which would not sustain an adjudication of bankruptcy. Its impact is far-ranging, in many instances with unavoidable and necessary adverse effect.[67] The liquidation of a

67. This Court's sophistication in insolvency matters makes it unnecessary to dwell upon the broad spectrum of the impact of a Liquidation Proceeding. Some observations, however, seem appropriate. There is, of course, a necessary depletion of SIPC's funds and a consequent advancement of the potential need for United States funds. Obviously, the member itself is extinguished, and the personal assets of proprietors and general partners may be utilized to satisfy creditors. *SEC* v. *Wick*, 360 F. Supp. 313, 316 (N.D. Ill. 1973). The appointment of a trustee automatically makes it unlawful for the firm to do business thereafter, unless the Commission otherwise determines, and it also authorizes the Commission to bar or suspend specified persons "from being or becoming associated with a broker or dealer." Section 10(b), § 78jjj(b). Although the customers of the member are protected as the Act provides, their securities are at market risk until returned to them. And in general, the proceeding affects all creditors of the firm including banks [*e.g.*, *SEC* v. *Morgan Kennedy & Co., Inc.*, [1973-1974 Tranfer Binder] CCH FED. SEC. L. REP. ¶ 94, 568 (S.D.N.Y. 1974)], other brokers or dealers [*e.g.*, *SEC* v. *Packer, Wilbur & Co., Inc.*, 498 F. 2d 978 (2d Cir. 1974)], computer service bureaus [*e.g.*, *SEC* v. *J. Shapiro Co.*, No. 4-73 Civ. 212 (D. Minn., filed March 8, 1974) (Owens, Referee), *aff'd*, No. 4-73 Civ. 212 (D. Minn., filed September 10, 1974), *appeal docketed*, No. 74-1760, 8th Cir., October 16, 1974] and other persons and institutions which customarily deal with broker-dealers such as transfer agents [*e.g.*, *SIPC* v. *Seed Capital Corp.*, 74 Civ. 878 (S.D.N.Y.)] and the clearing corporations of the self-regulatory organizations [*e.g.*, *In re Weis Securities, Inc.*, 73 Civ. 2332 (S.D.N.Y.) and *SEC* v. *Doores Securities Corp.*, 72 Civ. 3640 (S.D.N.Y.)].

major firm[68] teaches the wisdom of Congress' grant of discretion to SIPC. If prudent restraint will permit the implementation of other viable solutions, its exercise will serve the best interests of customers, the industry, the general public, and the funds of SIPC and the United States. The Members and self-regulatory organizations must be allowed to work out the problem, with the Commission's oversight in the public interest. Reasonable forebearance in the commencement of a Liquidation Proceeding is the necessary corollary to its prompt use in appropriate cases. Whether a particular case is appropriate, legally and otherwise, calls for hard judgment and frequently complex financial and regulatory determinations.[69]

The surveillance systems mentioned above have apprised SIPC of hundreds of situations of varying degrees of financial difficulty.[70] Many have been resolved without SIPC's

68. *In re Weis Securities, Inc.*, 73 Civ. 2332 (S.D.N.Y.). That proceeding involves approximately 32,000 securities customers, approximately $174,000,000 in customers' cash and securities, approximately $16,500,000 exposure to SIPC's funds, and has affected subordinated lenders (approximately $6,220,000), banks, stock exchange clearing corporations, hundreds of the debtor's employees, and numerous other persons and businesses.

69. See Guttman, *Broker-Dealer Bankruptcies*, 48 N.Y.U.L. Rev. 887, 930-31 (1973); Karmel and Weissman, *Taking Stock of the Court's Jurisdiction in a SIPA Liquidation*, 41 Brklyn. L. Rev. 1, 17-18 (1974). The instant case is one in which the judgment against a Liquidation Proceeding seemed necessitated by a confluence of several independent factors (SA 39), among which were the clear impossibility of implementing the Act as Congress intended by reason of the practical completion of the liquidating receivership, and the commingling and liquidation of the businesses, assets and affairs of several of Guaranty Bond's affiliates who were not Members of SIPC.

70. See 3 SIPC Ann. Rep. 17 (1973); 2 SIPC Ann. Rep. 17-18 (1972); 1 SIPC Ann. Rep. 19-21 (1971); 1 SIPC Conf. Rep. 25 (1973).

intervention,[71] frequently by merger, acquisition, new capital or self-liquidation (sometimes *via* the sale or transfer of customers' accounts and branch offices to financially sound firms). Illustrative of the last are the well-publicized cases of du Pont Glore Forgan, Inc. and W. E. Hutton & Co.

SIPC's Discretion—Exercised At The Highest Level

By vesting SIPC with discretion Congress clearly did not place its customer protection program in the precarious custody of an unsupervised profit-oriented corporation. It reposed its confidence in a *quasi*-public nonprofit corporation (i) whose board of directors (carefully balanced against industry domination)[72] and funds would not be controlled by a voting membership, (ii) whose board chairman and vice-chairman would be directors not recently associated in any way with the securities industry,[73] and (iii) which in any event would remain subject to extraordinary supervisory powers granted to the Commission.

SIPC is not a sprawling bureaucracy. It was intended to be and is a small organization,[74] a result made possible

71. As of this writing, SIPC has commenced 113 Liquidation Proceedings, of which 108 resulted in the actual liquidation of the Member. The remaining five cases illustrate another form of prudent restraint. In those SIPC withdrew its application after the Member (in temporary receivership in four cases) found ways to satisfy its obligations to customers. See *McMaster Hutchinson & Co.*, No. 74C2549 (N.D. Ill.); *Cash Shoaf & Company, Inc.*, Civil Action No. 73-C-123-R (W.D. Va); *W. A. Fox & Co.*, Civil Action No. 1238-73 (D. N.J.); *Smith Bros. & Co.*, No. 73C1374 (N.D. Ill.); *Bellis & Co.*, Civil Action File No. MO-73-CA-41 (W.D. Texas).

72. See 116 CONG. REC. 43232-33 (1970) (remarks of Mr. Muskie).

73. Section 3(c)(2)(C)(ii); §78ccc(c)(2)(C)(ii).

74. At this writing SIPC has a total complement of 44 officers and employees. Cf. 3 SIPC ANN. REP. 31 (1973).

by the plan of the Act which places the primary responsibility in Liquidation Proceedings upon the trustee, his counsel and other staff. By bylaw[75] (filed with the Commission, as required) the board of directors has reserved the right to decide whether a Liquidation Proceeding is appropriate, except in cases involving a probable exposure to SIPC's funds not in excess of $1,000,000. In the latter cases the discretion is delegated to the chairman of the board. To date SIPC has had two chairmen, both former members of the Commission.[76]

Extraordinary Character Of The Commission's Section 7(b) Remedy

The remedy of enforcement granted to the Commission is in the nature of mandamus or a mandatory injunction. It is plainly supervisory and extraordinary. Not only does it authorize the Commission to seek judicial review of SIPC's discretionary corporate decisions, but it also contemplates the granting of unprecedented relief, *i.e.* a judicial determination compelling SIPC to commence a legal proceeding and commit its funds. Such a grant of authority to the Commission was a logical and necessary extension of the Commission's other equally extraordinary supervisory controls over SIPC (see "Commission Supervision" *supra* at 10). That power was carefully limited to the Commission which has the requisite expertise and authority to review and evaluate SIPC's decisions, as well as the public responsibility of a government agency which assures (i) the necessary balancing of all relevant factors in the public interest, (ii) the confidentiality of potentially damaging information regarding the subject Member, and (iii) a considered rather than precipitious commencement of a far-reaching enforcement action. Understandably section 7(b) grants the Com-

75. Article 7, reprinted at page 16a of the Appendix hereto.

76. SIPC's first chairman was Byron D. Woodside who was succeeded by Hugh F. Owens, the incumbent.

mission discretion as to whether to commence such a potent proceeding.

B. Section 7(b) Was Clearly Intended By Congress To Vest The Commission With The Exclusive Remedy For Enforcement Of SIPC's Responsibilities Under The Act. Under The Applicable Rules Of Statutory Construction As Applied By This Court, The Court of Appeals Erred When It Inferred A Duplicate Private Right of Action.

The basic design and fabric of the Act is evident. The self-regulatory organizations and the Commission were given primary responsibility to upgrade the industry and advise SIPC of failing firms. SIPC was given the primary responsibility to act for the protection of customers *via* a Liquidation Proceeding. Finally, the Commission was assigned to serve as Congress' instrument of substantial continuing supervision over SIPC *via* section 7(b) and other important provisions. The foregoing was well stated in the House Report (at 11-12) under "Commission Oversight". It is highly significant that in creating the section 7(b) enforcement remedy Congress granted it to the Commission and withheld it from the self-regulatory organizations themselves upon whom it placed other important responsibilities under the Act.[77] To urge that Congress tacitly conferred this extraordinary remedy upon the investing public at large, while withholding it from the more appropriate self-regulatory organizations, suggests a legislative sleight of hand for which neither paradox nor anomaly seem sufficiently descriptive terms. Having

77. See pages 12, 18-19 *supra*. See also sections 8 and 9, §§78hhh and iii. Similarly, the enforcement remedy was not granted to customers despite Congress' obvious preoccupation with their protection; nor was it granted to receivers or other fiduciaries although Congress specifically recognized that a need for the protection of the Act might appear after the appointment of a receiver, trustee and the like. Section 5(a)(3)(B), §78eee(a)(3)(B).

included the section 7(b) remedy among the Commission's extraordinary supervisory powers, Congress could not have given a clearer signal of exclusivity even if it had gone through the redundant exercise of saying it meant precisely what it did.

The exclusivity of section 7(b) is amply supported, if not required, by the rule of construction *expressio unius est exclusio alterius,* particularly as it has been applied by this Court in *Nat'l R. R. Passenger Corp.* v. *Nat'l Association of R.R. Passengers,* 414 U.S. 453 (1974) ("Amtrak") and *Switchmen's Union of North America* v. *National Mediation Board,* 320 U.S. 297 (1943) ("Switchmen's Union").[78] In *Amtrak* this court expressed the rule in very clear and helpful terms, the essence of which was stated thusly:

> "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."[79] (at 458)

78. See also *Renegotiation Board* v. *Bannercroft Clothing Co., Inc.,* 415 U. S. 1, 18 (1974); *United States* v. *Babcock,* 250 U.S. 328, 331 (1919); *Ash* v. *Cort,* 496 F.2d 416, 421 (3rd Cir.) (dictum), *cert. granted,* 43 U.S.L.W. 3279 (U. S. November 11, 1974) (73-1908); *Holloway* v. *Bristol-Myers Corp.,* 485 F.2d 986 (D. C. Cir. 1973); *Fort Worth National Corp.* v. *Federal Savings and Loan Ins. Corp.,* 469 F.2d 47, 52, 54 (5th Cir. 1972).

79. The Court continued: " 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' Botany Worsted Mills v. United States, 278 U. S. 282, 289 (1929). This principal of statutory construction reflects an ancient maxim—*expressio unius est exclusio alterius.* Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim would clearly compel the conclusion that the remedies created in § 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act. But even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent. Neuberger v. Comm'r, 311 U. S. 83, 88 (1940)." *Id.*

In *Fleischmann Distill. Corp.* v. *Maier Brewing Co.*, 386 U.S. 719 (1967), this Court also cautioned: "When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied." (at 720).

In *Amtrak* this Court reviewed section 307(a) of the Amtrak Act which authorizes the federal district courts, upon petition of the Attorney General, to restrain alleged violations of duty by Amtrak in its administration of the Amtrak Act. As in this case, section 307(a) uses no words of exclusivity and Amtrak was made generally amenable to suit.[80] This Court refused to infer a private right of action to enforce Amtrak's broad statutory responsibilities. Rather it held that the foregoing rule of construction required the conclusion that the Attorney General's remedy is exclusive in the absence of "clear contrary evidence of legislative intent." In language even more appropriate to section 7(b) of the Act this Court concluded:

> "In light of the language and legislative history of §307(a), we read it as creating a public cause of action, maintainable by the Attorney General, to enforce the duties and responsibilities imposed by the Act." (at 457).

In reaching its determination the Court noted with some emphasis that to infer a private right of action would produce results inconsonant with Congress' plan to provide an "efficient apparatus" to carry out the purposes of the Amtrak Act.[81] It also noted (at 464 n. 12) Amtrak's statutory duty to make periodic reports of its operations to the

80. 45 U.S.C. § 541; D. C. CODE § 29-904(b).

81. Referring to the line of cases which have inferred a private right of action [citing *J. I. Case* v. *Borak*, 377 U. S. 426 (1964)], this Court emphasized that a private right could not be inferred unless ". . . consistent with the evident legislative intent and . . . the effectuation of the purposes intended to be served by the Act." 414 U. S. at 458.

Congress and the President, a factor which the Court recognized enabled Congress to believe that the exclusive remedy given the Attorney General would be effective.

Amtrak would seem *a fortiori* to require reversal here. The result reached by this Court is even more appropriate in this case in light of the language of section 7(b) and the statutory framework in which it was cast. Some points of comparison which demonstrate *Amtrak's* controlling character are:

1. The Act vests the exclusive enforcement right in a government agency, the Commission, which for forty years has been charged by Congress with the enforcement of the federal securities laws. It includes the section 7(b) remedy among other far-reaching supervisory controls over SIPC. The Attorney General's role under the Amtrak Act is far less pervasive.

2. By reason of its general enforcement activities and the mandate of section 5(a)(1) the Commission is perforce privy to every situation in which SIPC might have a responsibility.[82] The Act forces Commission focus at the threshold of every problem, and its scrutiny of SIPC's determinations follows as a matter of course and statutory duty. The same cannot be said of the Attorney General under the Amtrak Act.

3. Section 7(b) of the Act unambiguously *creates* a cause of action which it vests directly in the Commission. In contrast section 307(a) of the Amtrak Act conferred broad jurisdiction upon the federal courts to enforce Amtrak's breaches of duty "upon petition of the Attorney General." This Court noted: "In terms, §307(a) purports only to confer

82. The Commission is obliged to notify SIPC of the possible failure of a broker-dealer, and the self-regulatory organizations must make such reports to the Commission as well as SIPC.

jurisdiction, not to create a cause of action." (at 457). However, it found from the legislative history that the congressional intent "was to authorize certain types of results for the enforcement of the Act's provisions." (*Id.*).

4. Like the Amtrak Act, express words of exclusivity do not appear in section 7(b), and SIPC's general amenability to suit is, of course, included among its enumerated broad corporate powers. The reliance of the Court of Appeals solely on these two factors was surely misplaced.

5. Unlike Amtrak, SIPC is a non-profit corporation. The profit motive can never obscure its public vision.

Other important comparisons can be made.[83]

When considered in the context of the Act, section 7(b) leads to the conclusion of exclusivity for more compelling reasons than existed in the *Amtrak* case. It should be observed that the factors which influenced Mr. Justice Douglas' dissent in *Amtrak* do not appear under the Act,

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83. Section 307(a) of the Amtrak Act conferred jurisdiction upon "the district court . . . for any district in which the Corporation or other person resides or may be found. . . ." Section 7(b) of the Act requires the Commission to sue in the district court where SIPC's principal office is located. Designed for SIPC's convenience, this provision further negates a congressional intent to imply a private right of action which might be brought anywhere if jurisdictional bases existed.

Section 7(b) of the Act is entitled "Enforcement of Actions," and section 7 (of which it is part) is entitled "SEC Functions." There is no comparable indicator of exclusivity in section 307(a) of the Amtrak Act.

SIPC's board of seven includes two representatives of the federal government (see page 10, *supra*). Amtrak's board of seventeen includes only one. 45 U.S.C. §543(a)(1).

Like Amtrak SIPC's annual reports of operations are transmitted to the President and Congress. Moreover, they are accompanied by the Commission's comments.

and that the grounds upon which he distinguished *Switchmen's Union* do not obtain.

Although involving a statutory scheme not as analogous as *Amtrak*, the *Switchmen's Union* case also seems controlling in principle. There the Railway Labor Act had empowered the National Mediation Board to issue certificates of representation for collective bargaining. A union aggrieved by the Board's certification of another union sought judicial review. The statute did not expressly authorize the suit, but the right to review was said to arise by implication from 28 U.S.C. §41(8) granting federal district courts jurisdiction over suits arising under laws regulating commerce. This Court refused to find such an implied right stating, in part (Douglas J.):

> "A review by the federal district courts of the Board's determination is not necessary to preserve or protect that 'right'. Congress for reasons of its own decided upon the method created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. Whether the imposition of judicial review on top of the Mediation Board's administrative determination would strengthen that protection is a considerable question. All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. . . . In such a case the specification of one remedy normally excludes another." 320 U.S. at 301.

Thus *Switchmen's Union* recognized that Congress may altogether preclude judicial review of an administrative determination. The question here does not go that far. Judicial review is expressly authorized upon the petition of the Commission.

As this Court held in *Amtrak*, *Switchmen's Union* and numerous other cases, the operative rule of construction

must yield to "clear contrary evidence of legislative intent." (414 U.S. at 458). There is none here. Quite the contrary, the application of the rule is necessary to effectuate the legislative intent. That the Congress looked solely to the Commission as SIPC's overseer and enforcer is clear beyond cavil from the overall plan of the statute and the legislative history which includes the specific congressional intent that the Commission's supervision would be the only qualification upon SIPC's participation in the self-regulatory concept which Congress reaffirmed in adopting the Act.[84] The direct expressions concerning section 7(b) in the legislative history are few. However, they support the conclusion of exclusivity.[85]

In reaching its determination in *Amtrak* this Court noted the impediments which the allowance of a private suit would place in the path of the proper implementation of that statute. It would seem from all the foregoing that in adopting the Act Congress so clearly manifested its intent that the ineluctable conclusion of exclusivity, buttressed by the operative rule of construction, need not borrow support from the hazards of a contrary conclusion. Nevertheless, they exist with a potential for harm keenly to be avoided. To grant the enforcement remedy to anyone with requisite

84. House Report at 11-12.

85. See House Report at 22 and Senate Report at 15. It was the Commission which introduced the concept of "enforcement" in the legislative process, a fact further indicating that the remedy was intended solely for the Commission. The Act evolved from a bill prepared jointly by the Commission and representatives of the securities industry. Each had previously submitted separate bills. The bill submitted by the industry contained no provision for an enforcement action by the Commission or anyone (House Hearings at 57). The Commission's bills provided for enforcement by the Commission in a section which also granted the Commission the power to approve SIPC's bylaws (House Hearings at 35, 53).

standing could clearly subvert the statutory apparatus and the balancing of public interests which Congress sought to achieve. To proliferate the Commission's remedy, entrusted to its sound discretion, would create a situation pregnant with far more hazards, not susceptible of precise forecasting, than any benefit likely to result. Illustrations readily appear.[86] To extend the remedy to private litigants would place them in *pari causa* with the Commission without comparable compensating public responsibilities, thereby superimposing a volatile additional layer of extraordinary supervision upon a delicate statutory mechanism. All things considered, including the unique character, purpose and effect of the enforcement remedy, it is hardly a right which the Congress would have implied or left to inference or conjecture. It plainly did not.

It is respectfully submitted that the question here presented was correctly decided in *Bohart-McCaslin Ventures, Inc.* v. *Midwestern Securities Corp.*, 352 F. Supp. 937 (N.D. Tex. 1973), and that the reasons given by the Court of Appeals for allowing a private enforcement remedy do not survive the *Amtrak* holding or the foregoing analysis.

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86. The commencement of a private enforcement action could well interfere with the ongoing consideration of a Member's difficulties by the self-regulatory organization, the Commission and SIPC; could frustrate important efforts to find viable alternatives to liquidation (discussed at pages 20-22, *supra*); could start a fatal run on a Member in fragile but not terminal financial difficulty; and might involve a firm, perhaps in marginal financial circumstances, in the defense of a suit or at least a burdensome involvement in an action against SIPC. It is not difficult to see why the Congress committed the enforcement remedy to the Commission's discretion rather than lay the way open for serious hazards at the instance of strangers to the self-regulatory mechanism—persons not in a position to know whether some of the specified statutory conditions exist, whether the sign of financial difficulty they detect truly involves a danger to a Member's customers within the meaning of the Act, and worse to persons whose motives may be malevolent.

II

If it be assumed, *arguendo*, that customers (as defined in the Act) are possessed of an enforcement right despite Section 7(b), nevertheless a receiver lacks standing to assert that right on their behalf under controlling decisions of this Court.

Assuming, *arguendo*, that customers (as defined in the Act) of a SIPC Member are entitled to maintain an enforcement action against SIPC, whether a federal equity receiver has standing to maintain such an action as their representative is a question which seems dispositively answered in the negative by this Court's decisions in *Caplin v. Marine Midland Trust Co. of N. Y.*, 406 U.S. 416 (1972) and *McCandless v. Furlaud*, 296 U.S. 140 (1935). See also *Clarke v. Chase National Bank*, 143 F.2d 797 (2d Cir. 1943).

In *Caplin* a Chapter X trustee, claiming on behalf of the debtor's debenture holders, sued the indenture trustee for its failure to enforce certain negative covenants against the debtor as required by the Trust Indenture Act of 1939. In defense of his representative standing the trustee relied heavily upon the powers of a federal equity receiver which 11 U.S.C. § 587 confers on a Chapter X trustee.[87] Citing the *Clarke* case, *supra*, with approval, this Court held that absent congressional action the trustee's historic role of conserving and marshalling the debtor's assets could not be expanded to authorize suits against third parties involv-

87. In pertinent part that section provides that the trustee, if authorized by the Court, ". . . shall have and may exercise such additional rights and powers as a receiver in equity would have if appointed by a court of the United States *for the property of the debtor*." (Emphasis added).

ing rights solely of creditors. After turning aside the trustee's urgings that he was "in a far better position than debt investors" to discover the facts and prosecute claims (at 426-7), and that granting him standing would not "unduly deplete the resources of the debtor" since he already had a "duty of investigation" (at 428), this Court emphasized its holding thusly:

> "But as pointed out in the text, *supra*, petitioner only has authority to pursue claims belonging to the estate." (at 432 n. 22)

The trustee had relied on the *McCandless* case, *supra*, "to support the proposition that a receiver in equity may sue third parties on behalf of bondholders." (at 429). This Court pointedly countered:-

> "But, the opinion of the Court by Mr. Justice Cardozo clearly emphasizes that the receiver in the case was suing on behalf of the corporation not third parties; he was simply stating the same claim that the corporation could have made had it brought suit prior to entering receivership. *The debtor corporation makes no such claim in this case.* See generally 2 R. Clark, Law and Practice of Receivers § 362, at 619 (3d ed. 1959)." (at 429) (emphasis added).

This Court's decisions in *Caplin* and *McCandless*[88] apply the long established rule that a receiver stands in the shoes of the debtor and does not, by operation of law, succeed as an assignee to the personal rights of creditors of the debtor against third parties.

88. In *McCandless* the majority and dissenting justices disagreed upon the facts, but they unanimously applied the settled rule ". . . that a suit by the receiver must be in the right of the corporation, and that the most he can claim is what the corporation could claim: . . . ." (at 175, Roberts, J., dissenting).

Clearly, this Receiver's proceeding does not involve the assertion of Guaranty Bond's rights. It is a representational effort for the ostensible benefit of a special class of Guaranty Bond's creditors, namely, its customers. If successful it would not enhance the estate. Not only would SIPC's funds be advanced for the sole benefit of "protected customers", but the aggregate claims against the estate would remain the same by virtue of SIPC's subrogation rights (discussed *supra* at 16)—a factor similar to that considered relevant in *Caplin* (at 430-31).

This Court declined in *Caplin* to expand the powers of an equity receiver for the benefit of a Chapter X trustee in order to effectuate the purpose of the Trust Indenture Act of 1939 which ". . . had protection of public investors in mind" (at 422). Neither should they be expanded here because the Act, by a different means, seeks the same broad objective. The question is not whether a particular federal statute shall be enforced, but rather who is the proper party to do so. This discussion assumes, *arguendo*, that customers share the enforcement right with the Commission. The hypothetical premise therefore is that SIPC has a duty which both the Commission and customers may enforce. In that context, less reason appears for expanding the traditional role of a receiver than appeared in *Caplin, McCandless* or *Clarke, supra.* If such expansion is to be written into the law, as this Court said in *Caplin,* it should be by the hand of Congress.

In sustaining the standing of the Receiver the Court of Appeals relied upon criteria for standing evolved by this Court in cases involving review of governmental action at the instance of citizens and taxpayers. See, *e.g., Sierra Club* v. *Morton,* 405 U.S. 727 (1971). Such decisions seem clearly inapplicable to the question here which relates to

the traditional powers and authority of federal equity receivers. Further discussion seems unnecessary unless the Receiver elects to pursue the *Sierra Club* line of cases.

Conclusion

For the foregoing reasons, the petitioner respectfully submits that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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